

**RECEIVED****FEB 12 1999**

Before the  
**FEDERAL COMMUNICATION COMMISSION**  
 Washington, DC 20554

Federal Communications Commission  
 Office of Secretary

In the Matter of )  
 )  
 San Carlos Apache )  
 Telecommunications Utility, Inc. ) **AAD-**  
 )  
 Petition for Waiver of )  
 Section 54.403(a) of the )  
 Commission's Rules )

**CC 96-45**

TO: Chief, Accounting Policy Division  
 Common Carrier Bureau

**PETITION FOR WAIVER**

San Carlos Apache Telecommunications Utility, Inc. ("San Carlos")<sup>1</sup> by its attorneys and pursuant to Section 1.3 of the Commission's Rules, seeks waiver of Section 54.403(a) of the Commission's Rules to eliminate the prerequisite of state commission action, enabling San Carlos to receive an additional \$3.50 in federal Lifeline support per Lifeline subscriber. Grant of the requested waiver will promote the policies underlying the Commission's Lifeline rules and, accordingly, serve the public interest.

<sup>1</sup> San Carlos is a local exchange company ("LEC"), having been granted authority to operate as such by its Tribal Council. San Carlos is a "rural telephone company" under the Telecommunications Act of 1996 ("1996 Act"). Pursuant to Section 214(e)(6) of the Communications Act of 1934, as amended (the "Act"), San Carlos was designated an Eligible Telecommunications Carriers ("ETC") by the Commission. See Designation of Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., San Carlos Apache Telecommunications Utility, Inc., and Tohono O'odham Utility Authority as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, *Memorandum Opinion and Order*, DA 98-392 (rel. February 27, 1998) ("Designation").

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## **I. Introduction**

San Carlos is a certified ETC, providing basic telecommunications services to Native Americans residing on tribal lands located in Arizona. San Carlos currently receives universal support and Lifeline support.<sup>2</sup> San Carlos is subject to the jurisdiction of the governing body of a distinct federally-recognized Indian tribe, which regulates the provision of telecommunications services within tribal lands; the Arizona Corporation Commission ("ACC") does not assert jurisdiction over San Carlos.<sup>3</sup>

Section 54.403(a) of the Commission's Rules requires state commission action and state matching support before additional federal Lifeline support of \$3.50 per Lifeline subscriber is made available to ETCs. San Carlos, however, is subject only to regulation by its tribal authority, which is not a "state commission."<sup>4</sup> Application of Section 54.403(a) therefore precludes San Carlos from eligibility for additional federal support. As demonstrated below, this result is contrary to the underlying purposes of the Lifeline support program. Accordingly, it is in the public interest for the Commission to waive the "state action" requirements.

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<sup>2</sup> *Designation*, DA 98-392 at ¶ 19.

<sup>3</sup> *Id.*

<sup>4</sup> *See* 47 U.S.C. §§ 153(40) & (41); *see also* AB Fillins Petition for a Declaratory Ruling Preempting the Authority of the Tohono O'odham Legislative Council to Regulate the Entry of Commercial Mobile Radio Service to the Sells Reservation Within the Tucson MSA, Market No. 77, *Memorandum Opinion and Order*, 12 FCC Rcd 11755 (1997)(*AB Fillins Order*)(finding that tribal authorities are not states); *Designation*, DA 98-392 at ¶ 4 (concluding that Tohono O'odham is not subject to the jurisdiction of a state commission).

**II. Section 54.403(a)'s State Action Requirements Should Be Waived to Provide the Maximum Support to San Carlos's Historically Under-Served Areas.**

**A. Waiver is Required Because The Rules Do Not Address the Situation of Tribal Rural Telephone Companies.**

Pursuant to Section 54.405 of the Commission's Rules, San Carlos, as an ETC, offers Lifeline service to qualifying low-income users and, pursuant to Sections 54.403(a) and 54.407, receives the initial \$3.50 of federal support for each Lifeline subscriber.<sup>5</sup> However, under the Rules, San Carlos is ineligible for the additional federal support of up to \$3.50 per Lifeline subscriber because San Carlos is not subject to the jurisdiction of the ACC, and thus is not subject to the requisite "state action." Specifically, San Carlos does not receive the \$1.75 additional federal Lifeline support because the state has no authority to approve the \$1.75 reduction in the portion of the intrastate rate paid by the Lifeline subscriber.<sup>6</sup> In addition, the state has not contributed any Lifeline support, so additional federal matching funds are not available under the Rules.<sup>7</sup>

The Commission has recognized that Indian reservations and tribal governments do not come within the definition of the term "state"<sup>8</sup> and that the LECs such as San Carlos are not subject to the jurisdiction of a state commission.<sup>9</sup> Because the distinct circumstances of tribal

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<sup>5</sup> The initial \$3.50 is currently provided in the form of a Subscriber Line Charge ("SLC") waiver. *See Federal-State Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 8962 (rel. May 8, 1997) ("*Universal Service Order*").

<sup>6</sup> *See Universal Service Order*, 12 FCC Rcd at 8963.

<sup>7</sup> 47 C.F.R. § 54.403(a).

<sup>8</sup> *See AB Fillins Order*, 12 FCC Rcd at 11761.

<sup>9</sup> *Designation*, DA 98-392 at ¶ 4.

rural telephone companies are not addressed, the combined effect of the Commission's Rules is to create an artificial barrier to San Carlos's access to the funding intended to benefit low-income subscribers.

**B. Waiver of the State Action Requirements of Section 54.403(a) to Enable San Carlos's receipt of the Additional Federal Support of \$3.50 Per Lifeline Subscriber is in the Public Interest and Should be Granted.**

Because Native American communities have the lowest subscribership and highest poverty ratios in the Nation, waiver of Section 54.403(a) would be consistent with the public interest<sup>10</sup> and advance the goals of the 1996 Act. Although San Carlos has made substantial progress toward fulfilling its fundamental purpose of providing initial telephone service to substantial portions of tribal lands, many potential subscribers who qualify for Lifeline service will be unable to afford telephone service at available support levels.<sup>11</sup>

San Carlos's subscribership levels for basic telephone service is significantly below the

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<sup>10</sup> Waiver of a Commission rule is appropriate if (1) the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and grant of the waiver is otherwise in the public interest, or (2) unique facts or circumstances render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, and there is no reasonable alternative. *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

<sup>11</sup> In 1996, San Carlos initiated telephone service by acquiring one of U S West Communications, Inc.'s Arizona exchanges. Because the purchased exchange did not have telecommunications facilities available to serve the entire area, San Carlos has been actively constructing and installing the necessary telecommunications equipment to provide service throughout this territory. Once this construction and installation is complete, San Carlos anticipates, based upon poverty statistics, that 1,500 of the 2,500 potential subscribers will qualify for Lifeline service. However, San Carlos expects that many of these qualified consumers will still be unable to afford telephone service at rates which do not reflect the full Lifeline reduction.

national average.<sup>12</sup> While San Carlos has substantially improved the subscribership ratios on its reservation since the commencement of service, it recognizes that the current numbers are too low and desires to take all possible measures to achieve subscribership levels comparable to the rest of the country. The availability of additional subscriber support will make the telephone service more affordable for the many eligible, but unserved, residents of tribal lands, thus furthering universal service goals.<sup>13</sup>

The Commission has emphasized that the "[a]ffordability of basic telephone service is necessary to ensure that low income consumers have access not only to intrastate services but to interstate telecommunications as well."<sup>14</sup> With respect to Lifeline programs, the Commission has acknowledged that the Act reveals a renewed concern for the needs of low-income citizens.<sup>15</sup> Congress has expressed the "principle that rates should be 'affordable,' and that access should be provided to 'low-income consumers' in all regions of the nation."<sup>16</sup>

The initial \$3.50 of federal Lifeline support per low-income consumer has not proved to be a sufficient financial incentive to foster the level of demand for Lifeline service which should

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<sup>12</sup> On the San Carlos reservation, only 80 - 90% of the residential households are expected to have telephone service once construction is completed, however, 60% are expected to qualify for Lifeline assistance. *See supra* note 11. *See also* Federal-State Joint Board on Universal Service, *Recommended Decision*, 12 FCC Rcd 87, 299-300 (1996) ("Recommended Decision") (telephone subscribership rate is almost 94 percent in the United States; current subscribership rates are only 87.1 percent among households with incomes less than \$10,000 and only 75 percent among households with annual incomes less than \$5,000.00).

<sup>13</sup> *See supra* note 11.

<sup>14</sup> *Universal Service Order*, 12 FCC Rcd at 8962.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

be generated in the San Carlos serving area. To increase the demand for Lifeline service, San Carlos seeks to lower Lifeline rates by an additional \$3.50, but requires access to the additional federal Lifeline support of \$3.50 to accomplish this goal without jeopardizing economical and efficient service to its other Native American subscribers.

Accordingly, San Carlos requests waiver of the requirement that state matching support be provided. There is no mechanism by which San Carlos can participate in the Arizona support plan, nor is it feasible for its tribal government to develop a support plan because San Carlos does not have a sufficient pool of customers or residents, with the mix of Lifeline and non-Lifeline customers which might be found in an entire state, to recover equitably the funds needed to fulfill the matching fund requirement. Accordingly, the public interest is best served by waiving this requirement altogether in this circumstance. The underlying policy goal of Section 54.403(a), the reduction in subscriber charges, will be effected by the tribal authority upon grant of the requested waiver. Insofar as Section 54.403(a) requires "state commission" approval of such reduction, waiver of the provision is also requested.

Grant of the waiver request will enable San Carlos to make Lifeline services more attractive and thereby positively affect the low subscribership level among the substantial populations of low income consumers on the reservation.<sup>17</sup> The Commission has emphasized that the public interest is served by such an outcome.<sup>18</sup> Absent Commission waiver of the state requirements of Section 54.403(a), the national public policy goals to increase

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<sup>17</sup> See *Universal Service Order*, 12 FCC Rcd at 8963 ¶352 & 8965 ¶358. See also *Recommended Decision*, 12 FCC Rcd at 299-300.

<sup>18</sup> Commissioner Gloria Tristani, Remarks to National American Indian Telecommunications Workshop (July 30, 1998).

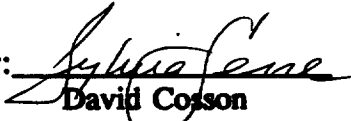
subscribership by reducing charges to low-income users,<sup>19</sup> especially Native Americans, will be thwarted.

#### **IV. Conclusion**

For the reasons stated herein, San Carlos respectfully requests that the Commission expeditiously review and grant the requested waiver needed to receive the additional \$3.50 in federal Lifeline support. The facts clearly demonstrate that strict compliance with the current federal Lifeline support rule is inconsistent with the public interest, and, accordingly, the public interest will be served by granting this waiver request.

Respectfully submitted,

**SAN CARLOS APACHE  
TELECOMMUNICATIONS UTILITY, INC.**

By:   
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February 12, 1999

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<sup>19</sup> See *Universal Service Order*, 12 FCC Rcd at 8952-53.

**DECLARATION OF BRENT KENNEDY  
SAN CARLOS APACHE TELECOMMUNICATIONS UTILITY, INC.**

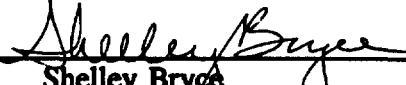
I, Brent Kennedy, General Manager of San Carlos Apache Telecommunications Utility, Inc. ("San Carlos"), do hereby declare under penalties of perjury that I have read the foregoing "Petition for Waiver" and the information contained therein regarding San Carlos is true and accurate to the best of my knowledge, information and belief.

Date: 2/3/99

Brent A. Kennedy  
Brent Kennedy

## **CERTIFICATE OF SERVICE**

I, Shelley Bryce, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, hereby certify that a copy of the foregoing was served on this 12th day of February 1999, by first class, U.S. Mail, postage prepaid to the following parties:

  
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